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ABSTRACT

This monograph compiles and analyzes court cases and due process hearings related to the identification and provision of services for gifted and talented youth, with special focus on the state of Indiana. Federal legislation related to the gifted commenced with the National Defense Education Act, followed by the 1969 amendments to the Elementary and Secondary Education Act. These and other federal measures stimulated initiatives within the states to develop educational opportunities for the talented and gifted, and 25 states and Guam mandated educational services. Disputes concerning educational services can be settled in three ways: mediation, due process, and litigation. Many states have due process provisions for the gifted that are similar to those for the handicapped. Ten recommendations are offered for due process in Indiana, including establishing statewide standards, training hearing officers, reporting decisions, and supplying technical assistance to school corporations. Litigation concerning gifted education is discussed in the areas of early admission to school, admission to special programs, racial discrimination, curriculum modification, transportation, teacher competence and certification, accidents, and child custody. Several suggestions for preventive law in Indiana are offered. Includes four references, a table of 14 court cases, and citations for seven federal laws. (JDD)

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Legal Issues and the Gifted: Implications for Education

A Monograph Prepared for the
Leadership Accessing Program

Frances A. Karnes and Ronald G. Marquardt
University of Southern Mississippi

Indiana Department of Education
Gifted and Talented Education Unit
Patricia B. Stafford, Manager

In conjunction with
Purdue University
Gifted Education Resource Institute
John F. Feldhusen, Director

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INTRODUCTION

This monograph deals with the legal aspects and litigation related to the identification and provision of services for gifted and talented youth. The response of schools to the pressure brought by parents and others to develop program services for the gifted and talented has been slow or resistant. In a small number of cases, parents of the gifted, emulating parents of disabled and handicapped youth, have looked to the courts to secure support in their quest for special educational services. However, little has been done to pull together the body of cases and precedents for legal action to secure the rights of gifted and talented youth for the special educational services which they need. Karnes and Marquardt have done an excellent job of reviewing the legal issues and precedents that relate to education of the gifted and talented. The monograph should be a valuable reference source for advocates of the gifted and talented and those who wish to develop program services for them.

BRIEF BIOGRAPHIES OF THE AUTHORS

Dr. Frances A. Karnes received her Ph.D. in education from the University of Illinois in 1973 and is presently Director of the Center for Gifted Studies and Professor of Special Education at the University of Southern Mississippi. She is coauthor of *Assessment in Gifted Education; Programs, Leaders, Consultants and Other Resources in Gifted and Talented Education*; and *Handbook of Instructional Resources and References for Teaching the Gifted*. In addition, she had authored numerous articles in scholarly journals. Dr. Karnes has served as national president of the Association for the Gifted and as president of the Mississippi Association for the Talented and Gifted. Her current interests are in the area of leadership development for youth and in legal aspects of gifted education.

Dr. Ronald G. Marquardt received B.S. and M.S. degrees from Kansas State College and a Ph.D. from the University of Missouri. He then attended Mississippi College School of Law where he was selected for the Moot Court Board and Law Review staff. A professor of political science at the University of Southern Mississippi, he also serves as staff attorney for the student legal services program and director of the University's paralegal studies program. He has published articles in such diverse publications as the *Administrative Law Review*, *Law and Policy Quarterly*, *College Student Affairs Journal*, *Midwest Quarterly*, *Law Library Journal*, and the *Mississippi Folklore Register*. At present, he is serving as editor-in-chief of the *Journal of Paralegal Education and Practice*. He has given presentations at several conferences on gifted children including the World Congress on Gifted and Talented Children and the Council for Exceptional Children.

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University of Southern Mississippi

Litigation and due process hearings for the gifted are in their infancy when compared to those for the handicapped. From 1977 to 1981, there were approximately 756 cases brought on behalf of handicapped students in state and federal courts. In 1979 to 1980, there were 2,584 state and local due process hearings (Maxwell, Galfo, and Rockwell, 1981). There have been only eighty court cases and approximately 100 due process hearings dealing with gifted students during the last decade.

Even though parents, educators, and other advocates have increased their efforts during recent years to promote and encourage the development of expanded and enhanced educational opportunities for the gifted and talented, schools have been relatively slow in responding. As had been done in the past by advocates for the handicapped, individuals and groups pressing for gifted education development began to explore the legal rights of the gifted and to turn to due process hearings and ultimately to the courts in seeking recourse. As questions about these alternatives and inquiries about precedents mounted, it became evident that very little had been done to gather information which would be useful in responding to such questions. For the primary purpose of providing a basis for responding to these and related questions, plans for this project were formulated with the following objectives:

1. To determine a plan of action to find the court cases and due process hearings involving gifted students.
2. To compile and analyze the court cases and due process hearings.
3. To disseminate the findings to appropriate audiences in a variety of ways.

In late 1985, a plan of action to find the court cases and due process hearings was formulated. A search of the literature through ERIC and *Psychological Abstracts* yielded few citations. Legal computer data base searches offered additional citations. To further the search, notices were placed in the leading journals and newsletters in gifted education. As a result of these efforts, several additional cases were identified, some of which had been decided and some of which were still in the courts. Simultaneous with these actions, letters of inquiry were forwarded to every state consultant in gifted education in the United States and, as a cross-check, correspondence was sent to each chief state school officer.

Interestingly, conflicting information was received from a few states. Inquiries were also sent to all of the state attorneys general. Many of them, along with other members of the legal profession, were very helpful in identifying cases within their respective states. As the current but evolving information has been presented at state, national, and international meetings, more court cases and due process hearings have been identified.

During the early stages of this project, it became evident that many teachers, administrators, parents, and others associated with schools are interested in the relevance of court cases and due process hearings to the problem of initiating and developing adequate programs for gifted and talented youth throughout the country. Questions raised and comments made by participants in local, state, and national professional conferences at which the authors have made presentations indicate that interest is increasing. Responses submitted by state consultants in gifted education and by attorneys general attest to this widespread interest, as do the increasing number of inquiries received from around the country by the authors.

The current plan for dissemination of the information collected involves the continuation of presentations at professional conferences at all levels and written reports through newsletters, professional journals, and other publications. The culmination of the project will be a professional book.

FEDERAL LEGISLATION

Prior to the launching of Sputnik in 1957, the federal government had not passed legislation specific to the gifted. However, shortly after the launch, major legislative action was taken by Congress to provide large sums of money for programs of the type appropriate for bright or gifted students. Monies to state and local educational agencies and institutions were authorized and appropriated under the National Defense Education Act, and substantial funds were provided to the National Science Foundation for the development of innovative mathematics and science programs, along with a variety of other programs designed to challenge the gifted and to put the United States in a leading position in science and technology.

Following our initial space explorations, interest in the gifted diminished and the focus switched to disadvantaged and economically distressed students under the administration of President Lyndon B. Johnson and the "Great Society" program. The landmark Elementary and Secondary Education Act (ESEA) was passed by Congress in 1965. This legislation reflected a great change in emphasis because federal monies were no longer focused on programs for the gifted.

However, the educational amendments of 1969 to ESEA, "Provisions Related to Gifted and Talented," provided for the gifted and talented by initiating state leadership training and the development of innovative programs. These amendments also authorized the funding of instructional programs for the gifted

under the provisions of Title III and IV of ESEA. Further emphasis was given to gifted education by the inclusion of teachers of the gifted under the Teacher Fellowship Provisions of the Higher Education Act of 1965.

Of greater significance for gifted education over the long term was the inclusion in the 1969 amendments to ESEA of a directive which required the Commissioner of Education, Dr. Sidney P. Marland, to conduct a national survey to determine the status of gifted education across the nation. After thorough study, the Commissioner reported to Congress in 1971. The final document, which has become known as the Marland Report, set forth the first federal definition of the gifted and presented findings which revealed that little was being undertaken educationally for the nation's brightest students. The report to Congress indicated that the gifted were the most educationally neglected group of students in the United States, and that those from lower socioeconomic circumstances were the most underserved of the gifted. Of the local district principals surveyed, 57.5 percent stated that there were no gifted students in their schools. In state departments of education, only ten states employed a full-time person with responsibility for programs for the gifted and talented.

As a result of the Marland Report and the interest it generated, Congress amended ESEA in 1974 with PL 93-380 to establish the Office of Gifted and Talented (OGT) along with a national clearinghouse to disseminate information across the nation. Monies were also provided for state and local educational assistance, model projects, and training grants. The appropriation, \$2.56 million, was based on an estimate of 2.5 million school-age gifted and talented students — an appropriation of approximately \$1.00 per gifted child.

In 1975, the landmark legislation for the handicapped, the Education of All Handicapped Children Act, PL 94-142, was passed which guaranteed for all handicapped students the right to a free appropriate public education in the least restrictive environment. The right to procedural due process and nondiscriminatory testing was also set forth for the handicapped.

In 1978, Congress passed the Gifted and Talented Children's Education Act which amended ESEA and essentially extended PL 93-380. The funding mechanism directed that 75 percent of the monies appropriated be allocated to the states with the remaining 25 percent to be used as discretionary funds for such areas as the clearinghouse, professional preparation, and other support functions. The appropriation was increased from \$2.56 to \$6.28 million. This act, PL 95-561, was repealed in 1981 when the Educational Consolidation and Improvement Act was passed under the administration of President Ronald Reagan. Under the new legislation, 30 small, categorical education programs were consolidated into a single block grant. School districts could designate their use of block grant monies under Title II, Part C, Gifted and Talented. Unfortunately, few districts have used these monies for the gifted.

Although efforts have been made to have Congress enact legislation in support of gifted education over the past several years, the attempts have not been successful. Currently, advocates for the gifted are hopeful that SB H.R.5, Title IV (Gifted and Talented Programs), to be known as the Jacob K. Javits Gifted and Talented Children and Youth Education Act of 1987, will be passed. At this writing, the bill has passed the House and the Senate and is now in a House-Senate Conference to reconcile differences. The purpose of the bill is:

to provide financial assistance to state and local educational agencies, institutions of higher education, and other public and private agencies and organizations, to initiate and coordinate a program of research, demonstration projects, personnel training, and similar activities designed to build a nationwide capability in our elementary and secondary schools to identify and meet the special educational needs of gifted and talented children and youth.

The use of funds, as designated by the bill, may include preservice and inservice training for teachers and other professionals; establishment and operation of model projects and exemplary programs; strengthening of the capability of state educational agencies and institutions of higher education to provide leadership programs of technical assistance and information dissemination; and establishment of a National Center for Research and Development in the Education of Gifted and Talented Children and Youth. The proposed appropriation, as stated in the bill, is \$25 million for fiscal year 1989.

STATE INITIATIVES

The several measures passed by the Congress from 1969 to 1978 seem to have been very beneficial in that they stimulated initiatives within the states to develop and enhance educational opportunities for the talented and gifted. Especially influential were: (a) the 1969 ESEA amendments and the resulting Marland Report which brought the plight of gifted education to the attention of the Congress and the American public, and (b) the passage of PL 95-561 in 1978 which increased annual funding from \$2.56 to \$6.28 million, with 75 percent of the total to be allocated directly to the states to support programs for the gifted in the schools.

The federal legislation which mandated that schools serve the educational needs of the handicapped (PL 94-142, passed in 1975) has been used so successfully as a model by advocacy groups involving educators, parents, and other concerned citizens, that some states now have laws which also make it mandatory for the school to meet the special educational needs of the gifted and talented.

Mandated Gifted Education

In the *1987 State of the States Gifted and Talented Education Report* (Houseman, 1987), a document by the Council of State Directors of Programs for the Gifted, 25 states and Guam are reported as having mandated educational services for the gifted and talented. These are:

Alabama	Idaho	Ohio
Alaska	Iowa	Oregon
Arizona	Kansas	Pennsylvania
Arkansas	Kentucky	South Carolina
Colorado	Louisiana	South Dakota
Connecticut	Maine	Tennessee
(ID only)	New Mexico	Virginia
Florida	North Carolina	West Virginia
Georgia		Wisconsin

In 1963, Pennsylvania was the first state to require services for the gifted, and the mandate in Wisconsin will begin this year. Not all states having a mandate have the provision of due process.

THE SETTLEMENT OF DISPUTES

There are three ways to settle disputes in educational matters: (a) mediation, (b) due process, and (c) litigation.

The informal process of mediation is one in which two or more sides involved in a dispute are given the opportunity to come before an impartial third-party — a mediator — to resolve differences and to find a solution satisfactory to all sides. The mediator may or may not be an expert in special education or gifted education.

Agreements, or the decision to disagree, may be submitted in evidence at a due process hearing. A due process hearing is a formal process by which disputing parties can present evidence to a hearing officer who makes a decision on the evidence after reviewing it. The hearing officer's decision is given in writing and is binding unless appealed through proper educational and/or legal channels.

Litigation is a formal process in which a case is presented by an attorney before a judge. The result is legally binding unless appealed to a higher court.

Mediation

A few states suggest the use of mediation in the settlement of disputes for gifted children and youth. Mediation is not legally required, nor can it be used to delay or replace a procedural due process hearing once a written request for a hearing has been received by an educational agency.

The positive aspects of mediation include the fact that objectivity and negotiation can assist the disputing parties in developing viable alternatives (*Mediation*, 1982.) In terms of time and money, mediation is less costly for the parties involved. It is a less antagonistic approach than either due process or litigation and the resulting negotiated agreement can be conducive to positive relations in the future.

The mediator is someone who has no prior involvement in the dispute, either personal or professional, and who has not played a part in the identification, evaluation, or educational placement of the student. He/she should be pleasant, professional, and completely impartial, and should be sufficiently free of other obligations to complete the required responsibilities. The mediator does not render a decision, but assists the disputing parties in developing acceptable alternatives to the dispute. The major responsibilities are to: (a) conduct the conference, (b) write the agreement reached, and (c) give copies of the agreement to all parties involved.

The informal mediation conference may be requested by the parent or guardian, the child (if over 18 years of age), or the local educational agency. Others, in addition to these persons and the mediator, may attend the conference, but in order to keep the conference informal, the numbers should be kept to a minimum. During the conference, the child should be kept in his/her current educational placement unless the disputing parties agree to another placement.

The conference time will vary according to the nature of the dispute, but generally it is no more than a day. If an agreement is reached, a written document stating the terms of the agreement is prepared by the mediator and signed by all parties. All parties and the local education agency should receive a copy of the document. If an agreement is not reached at the mediation conference, the disputing parties should be informed by the mediator of their right to request, in writing, a due process hearing.

Mediation appears to have many positive aspects for all concerned and does not negate the right to procedural due process. It is a process that bears investigation at both the local and state levels. If this alternative is appealing, the establishment of guidelines for mediation and the training of the mediators should become priorities.

Due Process

Thanks to expansive interpretation by the courts of the due process clauses of the Fifth and Fourteenth Amendments, the words "due process" have often become the battle cry for aggrieved persons across the nation. Taking their cue from the courts, federal and state legislatures have added fuel to the due process fire by imposing numerous statutory due process restrictions on government actions involving students, teachers, and administrators.

The scope of the due process concept is quite imposing. The Fifth Amendment due process clause applies to the federal government, and the Fourteenth Amendment restricts the states. Both Amendments prohibit the respective levels of government from denying any person "life, liberty, or property without due process of law." Because the courts have recognized that education is a property right and because education is a state function, the Fourteenth Amendment proscription that "no person may be deprived of life, liberty, or property without due process" applies to state school districts. Additionally, school officials must be cognizant of the fact that state and federal statutes may also impose due process requirements upon their official activities.

What are examples of these constitutional and statutory due process requirements? Quite frankly, they are what everyone would agree to be fair play:

1. A notice in a timely fashion that a hearing will take place.
2. An opportunity to speak and present evidence at the hearing.
3. An opportunity to be heard by an impartial decision-maker.
4. An opportunity for an appeal procedure.

Although these four principles sound simple, much litigation has arisen over their application.

Ten states have essentially the same due process provisions for the gifted as they do for the handicapped. These states are:

Alabama	Louisiana	Pennsylvania
Alaska	New Mexico	Tennessee
Florida	North Carolina	West Virginia
Kansas		

One state, South Dakota, has specific due process provisions for the academically gifted. Connecticut has due process procedures specific to the identification of the gifted, but not to services for them. In four states, Indiana, Iowa,

Texas, and Montana, plus the District of Columbia, there are due process provisions under general state laws and/or regulations by which all students, including the gifted, have procedural due process rights. In Arkansas, Georgia, Nebraska, and Virginia, due process hearings have been limited to the discretion of the local districts. In the remaining states, it has been reported that there are no due process provisions for the gifted.

In Indiana, there is a general provision for hearings to be conducted for any student needing a transfer from one school district (corporation) to another. During the 1986-87 school year, according to the Department of Education, three hearings were conducted for gifted students with one student being granted a transfer to another district. Two students were denied a transfer based on the hearing officers' decisions that the school district (corporation) in which the student was seeking enrollment had the same curricular offerings as the home/current district. The second denial included a statement of no space availability.

The states that provide due process procedures for gifted children have certain procedural mechanisms in common. Most of the states, for example, require written notice to the parties as to when the hearing is to take place. While such a requirement seems obvious, in reality it can be abused. To help prevent abuses from taking place, the written notice should be in language understandable by all parties and sent to the parties on a date which allows adequate preparation for the hearing. All of the states require either a written or electronically recorded transcript of the hearing and all of the states allow for the ample production of evidence. Parents are permitted to choose whether they want the hearing open or closed, and all of the states allow both counsel and expert witnesses to participate. Also, all of the states give the opportunity to either the school district or the parents to initiate the due process proceedings. Two jurisdictions, Iowa and the District of Columbia, allow the student to request a due process hearing.

Every state, except Iowa, uses a single hearing officer to conduct the initial due process hearing. All jurisdictions make some provision for carrying this administrative appeal to the courts. The states differ as to whether the appeal goes to an intermediate appellate court or a trial court, but each state eventually provides the opportunity for the losing party to have a day in court. It should be noted, however, that some states have a multi-tiered review process, and this process would have to be exhausted before an appeal to the courts would be permitted.

The states vary in their approach to the selection and background requirements of their hearing officers. For the sake of simplification, the selection and background procedures can be categorized into three models: (a) educational, (b) political, and (c) legalistic. Iowa best illustrates the educational model since the three hearing officers are all members of the Iowa Department of Education staff and selected by the head of the education office. In some cases, the hearing officers may be members of the same office within the state education department.

Louisiana has an interesting selection procedure in that there is the opportunity for the parish (county) supervisor to enter the selection process by appointing the hearing officer from a list of names approved by the Louisiana Department of Education. The system is also politically sensitive in that the parent may refuse one name offered for the hearing officer task.

A more legalistic approach is followed by Florida. In that state, there is a state government agency, the Division of Administrative Hearings, which is located in the Division of Administration. Hearing officers employed by this agency are required to be attorneys who have had five years of legal experience. These attorneys serve as hearing officers for all types of state agency due process hearings. In this model, the emphasis is on ensuring that the hearing officer has the legal competence to conduct a due process hearing.

West Virginia has established what appears to be an excellent system for selecting and training hearing officers. When a hearing officer is requested by a local school district, West Virginia Department of Education sends the school district three names. Each party is allowed to strike one name, with the party initiating the hearing being allowed the first removal. The remaining nominee acts as the hearing officer. More impressive than the selection procedure is the background required of persons on the Department of Education hearing officer list. Hearing officers in West Virginia must have the following qualifications:

1. A college degree.
2. A West Virginia special education certificate.
3. Professional special education experience within the past two years.
4. Completion of a hearing officer training program.
5. No professional or personal interest in the proceeding.

To assist their state hearing officers, the Department of Education in West Virginia has prepared an excellent due process manual (*Hearing Officer's*, 1985). Written for PL 94-142 hearings, the manual applies to all hearings involving exceptional children. In West Virginia, this encompasses gifted students.

The appellate stage is an important aspect of the due process concept. Seven states route their appeals through the state education office, and two states have established special due process appeals agencies. As mentioned above, after exhausting this administrative appellate procedure, these states then provide access to the appropriate courts. On the other hand, several states such as Alabama, Tennessee, West Virginia, and South Dakota allow direct appeal to the courts from the initial hearing officer decision.

Having some opportunity to resolve the dispute prior to reaching the court system has many advantages. Courts in most states are already overburdened, and an appeal to the courts with all the requisite formalities takes time and usually an extraordinary amount of money. Even though attorneys are involved at the due process stage, it is still more economically advantageous to avoid the courts. Therefore, having an opportunity for an administrative appeal should be in the best interest of all the parties involved in the dispute.

Recommendations for Due Process in Indiana

In the area of due process, the following recommendations are offered for Indiana:

- 1. Expansion of due process.**

Expand due process for the gifted beyond the general provision for all students to transfer to another corporation (district), to include screening/identification, programming in both the regular education program and in special provisions outside the regular classroom, evaluation, IEP, etc.

- 2. Establish statewide standards for due process.**

All gifted students throughout the state should be offered the same procedural due process. Appoint a committee consisting of persons such as the state consultant in gifted education, school administrators and teachers, college and university faculty, Indiana Association for the Gifted representatives, and the educational liaison officer from the Attorney General's office to develop these uniform procedural standards.

- 3. Establish a model for due process.**

The committee should review the current due process model and procedures for the State of Indiana along with models established in other states and adopt, adapt, or formulate a model appropriate to Indiana.

- 4. Elements of the model.**

Components of the model should include, but not be limited to: jurisdiction; selection, background, and training of the hearing officer; procedures for conducting the hearing and issuing the decisions; and the steps in the appeal process.

5. Positioning the model.

The model should be delineated either within the rules and regulations pertaining to the gifted or legislation. Much discussion and debate should precede the decision on this matter.

6. Training for hearing officers.

A plan should be put into action for training a cadre of hearing officers. The plan should include criteria for the selection of those to be trained, the development of a handbook for the training, and possible videotape simulations. Provisions should be made for the continuing education of the hearing officers.

7. Provisions for the collection of hearing officer decisions.

Within the State Department of Education, provisions should be made for the collection of hearing officer decisions.

8. Report of hearing officer decisions.

There should be an annual report and analysis of hearing officer decisions. This information should be helpful in such activities as the update and expansion of state rules and regulations for gifted education and in all areas of concern in procedural due process.

9. Public awareness of due process for the gifted.

The public should be made aware of due process for the gifted. Radio, newspaper, television, and other media should be employed to bring the rights of gifted children and youth before the public. The Indiana Department of Education, in cooperation with such groups as the Indiana Association for the Gifted, colleges, and universities may wish to join in the effort.

10. Technical assistance to school corporations.

The State Department of Education, perhaps in cooperation with colleges and universities, should provide technical assistance on due process to school corporations to assist them in the implementation of the model. Training sessions with accompanying written and visual materials will help districts understand and use the established model.

Litigation

Research on gifted litigation began with the question of whether gifted children were seeking relief in the courts. American court reports, with some exceptions, print only appellate decisions. Thus routine legal research procedures do not uncover cases that have not yet been decided at the appellate level. Nevertheless, a manual and computer search of legal research materials unearthed a variety of cases concerning gifted children and tort, domestic relations, and education law. A study of these cases suggests that gifted children, unlike handicapped children who have the backing of a federal statute which mandates educational opportunity, were having and would continue to have a difficult time winning in the courts. Several hurdles stand in the way of gifted children using the courts as a vehicle for gifted education reform.

Probably the highest hurdle to overcome is that all cases must rest upon some legal foundation, be it constitutional, statutory, or common law. Thus far, neither federal nor state constitutional claims such as "equal protection" and "due process" have been productive. Nor have the courts accepted arguments that general education clauses, such as "a state shall provide a public education for all its citizens," encompass the concept that a child has a right to a gifted education program. While both federal and state courts have recognized that a child has a property right to an education, both levels of court have been mainly concerned with access to that right, rather than the quality of the individual instruction.

Compounding the difficulty for persons interested in using the courts is that only approximately 25 states have a statute mandating gifted education. It is in these states where plaintiffs are suing and winning courtroom skirmishes on behalf of the gifted. States that have permissive gifted education statutes have not been fertile ground for plaintiffs acting on behalf of the gifted because judges tend to defer to the discretion of educational administrators. If the state has no gifted education statute, gifted students have an impossible leap to make to win their gifted education claim.

Common law, or as some label it, judge-made law, enters the gifted litigation area mostly in tort or domestic relations law. However, there is one case described below in which a trial judge borrowed a domestic relations common law concept to order the early admission of a gifted child to school. The genesis of most cases in gifted litigation involving educational issues are statutes, rather than common law principles.

Another problem with using the courts as a tool for winning victories in gifted education is the glacial pace with which most courts work. Because courts are often overburdened and understaffed, litigants in some states have had to resort to hiring private judges to decide their cases. Most court struggles are measured by years, and problems involving the education of gifted children usually require a faster remedy.

Finally, there is an economic hurdle present in gifted education cases. Courts and lawyers, depositions and discovery, interrogatories and investigations, all require money. Unless there is a fee shifting statute, the American legal experience is that each side of a lawsuit pays its own attorney fees. Therefore, a plaintiff in a gifted education case must usually find some volunteer legal help or be prepared to spend a considerable amount of money in trying the case.

Classification and Analysis of Cases

Before explaining the classification of cases, a word or two is required about federal and state courts. Because of PL 94-142, cases involving the education of the handicapped are brought in federal court. Because there is no federal statute mandating gifted education, most gifted cases concern state law. Thus, state courts will hear the majority of gifted education cases. An exception occurs when a federal constitutional issue is raised, such as equal protection of free speech.

Early in the search for cases, it became clear that there was a spate of cases regarding admission of children to school and specifically to gifted programs. These admission questions constitute the first section of cases, and under this topic are included not only admission cases, but cases concerning appropriateness of programs or the absence of such programs.

A second series of cases touching upon gifted education involves concern over racial discrimination in programs. While these cases are still in their infancy, it is anticipated that the next decade will see a considerable amount of case law develop in two areas. The first area involves the selection of minority children to participate in gifted programs. The second type of case will involve the types of tools (magnet schools, foreign language programs, leadership programs) used to make such desegregated programs viable for all gifted children.

A third category of interest to parents, teachers, and school administrators focuses on cases dealing with allocation of school resources and other policies. Teacher assignments, location of programs, and tuition payments are examples of issues in these cases.

Finally, two classes of cases focus on matters indirectly affecting school districts. School programs for the gifted often become a major issue when judges are awarding custody of children in divorce cases. The issue of the giftedness of the child is addressed in two ways. First, the court is often concerned over the custodial parent's interest in the educational well-being of the child. Second, when the child is identified as gifted, the court considers whether the custodial parent's school district has a gifted program. The second class of case in this section focuses upon accident cases involving gifted children at school. While there is no empirical evidence to suggest that gifted children are more accident prone than other children, there are some instances where mental ability and intellectual curiosity surpassed the physical ability of the gifted child.

Admission to School

A recurring problem in education is the early admission of gifted children into primary school. At issue is the question of whether a child who is mentally, physically, and emotionally ready to attend school can gain early admission despite not meeting a statutorily imposed chronological age.

An unreported 1984 Petal, Mississippi, case involved such a suit by parents against a public school board of education. The five-year-old child had been tested at a university and found to be at the first grade level in reading and "all other subjects" (Plaintiff's Complaint, Par VI). At the time this case was decided, Mississippi did not have a public kindergarten and required children to be at least six years of age by September 1 to be admitted to the first grade. The school board abided by the statute and refused to admit the child. Mississippi, unlike most other states, did not have an early admission exception in their law.

The proceeding was brought in a county court which, among other things, serves as a youth court in Mississippi. The parents sought an injunction against the school board to permanently enjoin them from refusing the plaintiff the right of free admission to the public school system. Using the test results and professional judgments of the social/emotional development of the child as a basis for the decision, the county court judge ordered the child to be admitted into the first grade.

Admission to Programs

Not as successful in their litigation were the parents of Erica Bennett. At issue in the Bennett case was the admission of Erica to the New Rochelle gifted program (*Bennett v. New Rochelle*, 1985). Acting under the New York permissive statute, New Rochelle established (in 1976) a full-time gifted program for the district's elementary children. Multiple criteria were used to select students for the program. The program was so successful that a modified, part-time gifted unit was instituted in 1981.

Erica's parents were notified in 1984 that Erica had qualified for the New Rochelle gifted program. Unfortunately, 108 other children were identified as eligible for the 27 student, full-time program. Under the guidelines used in establishing the program, the 27 spaces were chosen through the use of a lottery. Erica was not selected in the lottery, but was offered placement in the part-time program.

Richard Bennett, Erica's father and an attorney, rejected the admission to the part-time program and instead brought suit against the local school district. Attempting to touch every legal base, Bennett's complaint charged that:

1. Education Law Article 90 of the New York State Constitution imposed an affirmative duty on the district to provide a full-time gifted education for all children identified as talented and gifted; and
2. New York's general education article (Art. IV, 1) required the school district to provide full-time gifted instruction for Erica; and
3. Using a lottery system to select students for a gifted program violated the equal protection clause of the Fourteenth Amendment of the United States Constitution and the state Constitution's equal protection clause (Art. I, 11).

None of the claims proved persuasive to the New York Appellate Court. Article 90, the Court concluded, was only an enabling statute which permitted districts to operate gifted programs. The law did not require any type of program, but only stated that programs had to be in accordance with guidelines of the Commissioner of Education, and that money received for gifted education had to be spent on gifted programs. Under the law, the court reasoned, school districts had discretion as to the type of programs instituted, and how the money was to be spent on gifted education. The court also denied appellant's claim that Article 90 required the school district to appropriate funds for the special education needs of the gifted analogous to the expenditure of funds for the handicapped. Federal and state law, the court concluded, placed an affirmative duty on the district to provide for the education needs of the handicapped.

New York's general education article, adopted in 1894, required the legislature to provide "for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." Previous judicial interpretation, the court pointed out, had defined the word education in the article to mean a sound basic education. In this case the Bennetts had not argued that Erica was not receiving a basic education, and citing a 1980 New York Federal District Court case, *Johnpoll v. Elias*, the court concluded that not allowing Erica to attend the education program of her choice was not a violation of her constitutional right to an education.

Because the court rejected the Article 90 claim, the last question of whether the selection of students for the full-time program was so arbitrary and capricious that it violated the federal and state equal protection clauses had to be answered by the court. Again, the Bennett's arguments were rejected. The court instead found the lottery to be an "impartial and fair manner of selecting the participants." Noting that education was not a fundamental right under either the United States or New York Constitutions, the court stated that the school district only had to show a rational basis for conducting the lottery and the "nondiscriminatory" and "nonsubjective" lottery procedure met that test.

Racial Discrimination

Almost certain to generate litigation during the next decade are the procedures used for selection of participants in gifted programs. Such procedures should encompass multiple criteria and not discriminate on the basis of race or gender. The best example to date of a school district attempting to meet these standards involves the Prince George's County School District, in Maryland (*Vaughn v. Board of Educ.*, 1983). While this case is a general school desegregation case, the federal district court did focus a portion of its decision on the district's gifted program and this segment of the opinion was used as a basis for appeal to the Fourth Circuit United States Court of Appeals. A cursory appraisal of the district's effort suggests every attempt was made to establish a racially neutral gifted program. For example, the school district included blacks on the committee which created the gifted program and established several criteria for the selection of students for the program. In addition to the usual standardized tests, opportunities were written into the selection guidelines for parental and teacher recommendations. Inservice training was provided to teachers so that gifted minority children would not be overlooked. Despite these precautions, the gifted program lacked minority students.

The federal district court recognized the district's effort to obtain minority participation and found no equal protection violation in the administration of the program. However, this finding was reversed on appeal to the Fourth Circuit Court of Appeals. Because the Prince George's County School District had not reached unitary status (one school district for blacks and whites), the appeals court concluded that the burden of proof was on the school district to show that they were not operating a racially discriminatory program. At the district court level, the court had used the traditional standard which placed the burden of proof on the plaintiffs. In addition, the appellate court was concerned that the inservice programs were not sufficient to allow teachers to identify gifted minority students. The case was remanded to the district court to ascertain whether the defendants could meet the burden of proof that they were not operating a racially discriminatory gifted program.

More encouraging from a judicial standpoint was the language contained in the 1983 Ft. Worth School desegregation case, *Flax v. Potts*. In that decision, the federal district court judge stated:

The court strongly encourages the school district to meet the needs of all of its students — not just the average students and those with learning difficulties, but also the students in the system who are gifted.

While encouragement does not equate with mandate, and a general exhortation is not as useful as a specific order, it is the most supportive language on record from a federal trial judge.

Curriculum Modification

Perhaps the most encouraging case to date in support of the gifted comes from Centennial School District in Pennsylvania (*Centennial v. Commonwealth*, 1986). Pennsylvania has an exemplary judicial and legislative record in protecting the rights of the handicapped and by statutorily placing the gifted student under the rubric of "exceptional children," it has mandated gifted education.

The facts in the case suggest that it could be a seminal case in gifted education. At issue in the case was a parental request that Terry Auspitz be given accelerated instruction in reading and mathematics. Terry, who was already in a 150 minute-per-week gifted program, had shown a special competency in these two areas and the parents requested that Terry be given individualized instruction in these subjects as part of his IEP.

The school district refused, stating that resources dictated that the pull-out program was all it could provide to the district's gifted students. A requirement to provide individualized programs for all gifted students, the school district argued, would constitute an overwhelming financial burden.

Terry's parents argued that Terry was gifted and should not be treated as gifted just 150 minutes a week. A due process hearing was held and the hearing officer ruled that Terry should remain at grade level and receive the accelerated instruction. The school district appealed and the hearing officer's decision was upheld in the Pennsylvania Trial Court. A second appeal was taken to the Pennsylvania Intermediate Appellate Court and again the school district lost. Realizing the importance of the case, the school district appealed to the state's highest court. At this writing, the case has been orally argued before the Pennsylvania Supreme Court, but no decision has been rendered.

School Policy and Students

One of the most encouraging cases for gifted students comes once again from Pennsylvania (*Woodland Hills v. Commonwealth*, 1986). At issue in this case was whether the state's general transportation statute or the specific statute regarding gifted student transportation should apply. The Pennsylvania State Department of Education requested the Pennsylvania Commonwealth Court to issue a declaratory judgment ordering the Woodland District to comply with a statute that required the district to furnish midday transportation for gifted students enrolled in private schools.

Initially, the Woodland Hills School District bussed gifted public and nonpublic school children to one of the district's public schools for instruction. Later, the district reversed the process and sent public school teachers to individual public school buildings to teach gifted classes. In the bureaucratic shuffle, private students lost their midday transportation to the gifted classes.

The school district argued that the state's general transportation statute only required that school districts provide identical transportation services to public and private school children. Because the district was no longer providing midday transportation to public school gifted students, the district was under no obligation to provide such transportation to private school children dually enrolled in a public school gifted program. Interpreting P.S. 13-1374, the gifted student section of the code, the court held that the district must furnish either free transportation to the dually enrolled gifted students or provide board and lodging. Under this statute, if a student was enrolled in a special class approved by the Department of Public Instruction, the district had a choice of either providing transportation or board and lodging. Because the private school children were dually enrolled in the public school program for exceptional children, they were entitled to the benefits of the law. Therefore, even though the district was not providing transportation to public school children to attend gifted classes, the court ruled they must provide services which would make certain that the private school students could attend such classes. This decision was a big victory for private school students enrolled in public school gifted classes in Pennsylvania.

A novel approach to securing gifted education for their children was exercised by Illinois plaintiffs in 1987 in *Davis v. Board of Trustees*. In this case, the parents of several school age children effectively petitioned for a rezoning of their property so that the property would be located in a larger school district with a broader curriculum: a gifted program, college preparatory courses, and more extracurricular activities. One family, the Davis family, had one child with an IQ of 160 and they were most eager to enroll their children in a school district that had a vast array of academic and extracurricular activities. Interestingly, both school districts fought the parents rezoning petition. The parents won at the trial court and the school districts appealed.

The appellate court weighed the interests of all parties, decided the balance was with the parents, and affirmed the trial court decision. The court held that the amount of tax revenue lost by the old school district was too small to be of consideration. On the other hand, the benefits to the new district and the persons living in the detachment area, particularly the Davis family, were of considerable importance. Of particular concern to the appellate court were the "whole child" and "community interest" factors. The whole child factor used by the court took into account the fact that the extracurricular activities of the new school district would complement the academic training of the children. The community interest factor recognized that the Davis family shopped, went to church, and sought their entertainment within the new school district boundaries. They had no such ties with the old district, and the court reasoned that the Davis family would be more likely to participate in community activities in the new school district which, again, would benefit the children. This case is an excellent example of a court not allowing technical, legal considerations to get in the way of the academic and social welfare of children.

School Policy and Teachers

As more and more school districts initiate gifted programs, there is certain to be an increase in court cases involving teachers of gifted children. Questions of classroom competence, certification regulations, and seniority problems will arise. The two cases discussed below are forerunners of what is certain to be the subject of future litigation.

Carolyn Rosenthal was employed by the Orleans Parish School Board to teach biology courses at a high school for exceptional children. Students enrolled in the high school had to meet specific IQ requirements and an established level of academic achievement. At the time she was hired, school administrators had in place special qualifications for teachers at the school for the gifted.

When a dispute with school administrators over grading procedures could not be resolved, Ms. Rosenthal was transferred to another senior high school which did not have special academic requirements. Although her salary was kept at the same level, she concluded that the transfer was a demotion, and under the Teachers' Tenure Act, she was entitled to a written notification of the complaint against her and a due process hearing. School authorities, however, argued that the transfer was not a "demotion" and no special notification or due process procedures were necessary. The trial court decided in favor of Ms. Rosenthal and issued an injunction against the school board prohibiting the transfer.

With one justice dissenting, the Louisiana Court of Appeals reversed the trial court, dissolved the injunction, and dismissed the suit (*Rosenthal v. Orleans Parish School Board*, 1968). The appeals court based its decision on testimony that there was no difference between rank and dignity of faculty in the senior high schools in Orleans Parish. Therefore, because the transfer did not involve a lesser salary, there was no demotion or lessening of Ms. Rosenthal's professional standing. As the Teacher Tenure Act applied only to demotions or dismissals, Ms. Rosenthal was not entitled to its protections.

Rosen v. Montgomery County Intermediate Unit (1985) involved the suspension of two tenured teachers of the gifted. This Pennsylvania case is a good example of the type of controversy in which the courts are willing to play an active role.

Janet Rosen and Phoebe Baxter were teachers in the Montgomery County, Pennsylvania, gifted program. They were suspended from their positions at Montgomery County Intermediate Union No. 23. The two teachers appealed their suspension but lost at the trial court level. However, a second appeal to the Pennsylvania Intermediate Court of Appeals was successful.

The teachers won because the school district did not abide by the procedures spelled out in 24 P.S. 1101 through 27-2702. This act stated that tenured teachers

could be suspended for a decrease in public enrollment, school consolidation or reorganization, and curtailment or alteration of educational programs. If the suspension was triggered by the latter, the State Department of Public Instruction had to approve the action.

Montgomery County had argued that the suspensions were necessary because of declining enrollment. In fact, it had been an economically motivated curriculum reorganization which had resulted in the suspensions. Under Pennsylvania law, such curriculum reorganizations had to be approved by the Department of Public Instruction. The school district had failed to obtain the necessary approval.

Because the school board had not complied with the Pennsylvania procedure under the curtailment or alteration section of the law, and no other provision of the law applied, the appeals court reversed the trial court's decision. The teachers were reinstated and awarded back pay and benefits from the date of suspension.

Accidents

One of the surprising aspects of a study of litigation involving gifted children was the number of cases involving serious injury to gifted students. Although there are no data to suggest that intellectually gifted students suffer a higher accident rate than non-gifted children, some children, because of their giftedness, are placed in situations where accidents can and do occur. Because of their intellectual prowess, they are asked to carry out tasks beyond their emotional or physical capabilities, or they attend programs away from the securities provided at home.

Two cases illustrate these principles. The Plain Township, Ohio, case involving Laura Ann Dieringer is especially tragic. Laura, a member of Mensa and an extremely talented seven-year-old, was asked by her teacher to roll the video equipment cart into the classroom. Enroute the television toppled from the cart and struck her head. Tragically, she died 90 minutes later. Laura had been selected to handle the video equipment because of her excellent grades and because she was such a good student. The Dieringers brought suit against the school district but lost at the trial level. The Dieringers do not intend to appeal.

Illustrating the second example is the 1980 North Carolina case involving Martinez, who was attending the Western Carolina University summer gifted program. Martinez fell and injured his ankle on July 2. He requested to be taken to a doctor, but his counselor told him that the housemother was in charge and he should contact her. Unfortunately, the housemother was absent that afternoon and Martinez did not see her until 8:30 p.m. At that time, she told Martinez they would go to the infirmary the next day.

Examination by a physician the next morning suggested Martinez had experienced an Achilles sprain. Martinez informed his mother of the sprain on the evening of July 5, and she immediately asked to talk to the counselor. The counselor stated that Martinez would be taken to a doctor the next day. By 5 p.m. the next day,

Martinez had not been taken to a doctor and he informed his mother of this fact. Mrs. Martinez then requested that the housemother take her son to a doctor. Martinez was taken to the infirmary and a nurse again diagnosed the injury as a sprain. This diagnosis was communicated to the student's mother.

The next day, July 7, the student was allowed to participate in a hiking trip at Joyce Kilmer National Park. On July 8, six days after the injury, a physician telephoned Mrs. Martinez to inform her that her son had a ruptured Achilles tendon. Mrs. Martinez rented an airplane and had her son flown to a town where surgery could be performed.

In their suit against Western Carolina University (*Martinez v. Western Carolina Univ.*, 1980), the plaintiffs contended that the negligence of the university's employees caused the accident. In a hearing before the Deputy Commissioner of the Industrial Commission, the plaintiffs won \$13,500 as damages for pain and suffering and a permanent scarring caused by the delay in treatment of the ankle. This award was overturned on appeal when the full membership of the Industrial Commission heard the case.

An appeal by the Martinez family to the North Carolina Court of Appeals resulted in a reversal of the full Commission's decision. The Court of Appeals held that the full Commission had not made sufficient findings of fact to support their conclusion of law. Therefore, the case was vacated and remanded to the Commission for additional hearings.

As mentioned above, there is no evidence that gifted students are extremely accident prone. However, there is case law which suggests that the intellectual curiosity, the opportunity to participate in special programs, and the adult treatment of a gifted child presents situations endangering the gifted child. Recent accidents at the South Carolina and Mississippi governors' schools particularly illustrate that opportunities to participate in special programs can result in tragic accidents.

Domestic Relations

A second surprise was the number of times the giftedness of a child arose in child custody cases. *Goldman v. Logue*, 1982, provides one example. In *Goldman*, the mother was awarded the custody of the child at the time of the 1980 divorce. In 1981, the father sought custody of the child contending that he had remarried and could provide a stable home for the child. His suit was successful and custody of the child was awarded to the father. The mother, in a later proceeding, was ordered to pay \$225 a month child support. In 1983, the mother filed a change of custody suit asking that she be granted sole custody, or alternatively, joint custody. The trial court denied both requests.

An appeal to the Louisiana 5th Circuit Court of Appeals by the mother was also futile, as the appellate court affirmed the lower court's ruling. What is of interest is the mother's argument to the trial court that she would place the child in a

gifted school. Expert testimony was presented by the mother to the effect that her son would benefit from being placed in a private school for gifted children. The father, however, had a successful counterpoint. School records indicated that the child's academic performance had improved while he was living with the father, and that the child was enrolled in a program for gifted children in a public school. While there were other factors in the decision as to custody, the fact that the child was already enrolled in a gifted program in a public school had to be significant to the court in rejecting the change of custody petition.

Summary

Litigation in the gifted area has not reached the level of activity of cases involving the handicapped. At present, there is no federal statutory foundation for such litigation and approximately one-half of the states have no mandated gifted education requirement. However, there are indications that such litigation is increasing as parents and attorneys become more imaginative and tenacious in legal actions protecting the gifted. At present, the situation is similar to school racial discrimination cases in the 1940's and cases involving malapportionment in the early 1960's. If legislatures fail to respond to the needs of the gifted as they failed to respond to the needs of black students and voters residing in malapportioned districts, the courts will step in and fill the vacuum left by legislative inactivity.

SUGGESTIONS FOR PREVENTIVE LAW IN INDIANA

In the area of preventive law, the following recommendations are offered for Indiana:

1. **Review compliance of state statutes with federal statutes and court decisions.**

State and federal statutes and court decisions pertaining to any aspect of education should be reviewed to determine if the state is in compliance with the federal level.

Example: Supreme Court cases pertaining to student publications should be examined as gifted programs sometimes have their own newspapers.

Example: Federal law mandates equal access to education. Review state laws and rules/ regulations in light of this.

2. **Review state laws and regulations.**

Review state laws and rules/regulations pertaining to gifted education to determine if they are in compliance with other education laws and rules/ regulations within the state.

3. **Develop a monitoring system.**

To assure that all school corporations (districts) are in compliance with state laws and rules/regulations pertaining to gifted education, a monitoring system should be established by the Indiana Department of Education.

4. **Review annually the rules and regulations.**

An annual review of state rules and regulations with input from school corporations (districts) will assist in determining areas of weakness and give strength to the programs statewide for the gifted. The attorney for the Indiana Department of Education or from the Attorney General's Office should conduct the review.

5. **Accurate information disseminated to school corporations.**

The state laws and rules/regulations in gifted education should be given, in writing, to school corporations. Interpretations should be put in writing when questions arise.

6. Compliance in the school corporation (district).

School board members, superintendents and other school administrators, and teachers should have copies of all laws and rules/regulations pertaining to the gifted to assure that verbal communication does not lead to misinterpretation.

7. Accurate information should be given to parents.

School officials should prepare a brochure or handbook with the policies and procedures in gifted education for that district for distribution to parents and other concerned citizens. The brochure and/or handbook should have school board approval. The attorney for the school corporation should review it before board approval is granted.

8. Annual review for parents.

An annual review of the local policies and procedures for parents will alleviate possible problems. If differences in screening and identification for different program models exist (for example, intelligence test scores in elementary grades and achievement tests for secondary programs) they should be discussed. Notifying parents in advance will be beneficial to all involved.

9. Nondiscriminatory assessment.

Almost all school districts have students who are gifted and handicapped (i.e., blind) or from minority and ethnic groups. Nondiscriminatory testing procedures should be followed in the screening and identification of these students for gifted programs.

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